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No. 86-749

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY,
Petitioner

v.

ALABAMA STATE BOARD OF EDUCATION; and
WAYNE TEAGUE, STATE SUPERINTENDENT OF
EDUCATION, *et al.*,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF RESPONDENT BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it is premature for this court to review the denial of standing to a state university to sue its sister institutions and the state which created them where it has suffered no harm because the injunctive relief requested by the university was granted to other parties, and where the case in chief remains pending in the Court of Appeals?

2. Whether the Court of Appeals properly found that a state institution lacks standing to sue the state which created it under Title VI, the Fourteenth Amendment and Section 1983?

PARTIES

As more fully appears below, this respondent disagrees with petitioner's characterization of the case in chief as a "desegregation" case. It is more properly described as an "enhancement" case, in which two state universities and their support groups are attempting to utilize civil rights law to increase their funding and resources at the expense of the other state universities.

The petitioner has correctly named the parties to the case in chief currently pending in the Court of Appeals, but did not mention that this respondent participated actively in the injunction appeal as amicus curiae, arguing specifically that petitioner had no standing or right to make institutional claims against its creator, the State of Alabama, and its sister institutions.

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CITATIONS TO OPINIONS BELOW

The petitioner has in the petition correctly described and reprinted the opinions and rulings below.

JURISDICTION

Except for its argument below concerning advisory opinions, mootness and ripeness, this respondent does not dispute the jurisdiction of this Court to act on the petition in this case.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This respondent does not believe that any statutes or constitutional provisions, except for Article III of the

Constitution of the United States, should be considered in connection with this petition, since it raises the standing issue prematurely.

STATEMENT OF THE CASE

This is the third attempt of the petitioner to obtain piecemeal review by this Court of issues in the case in chief below. On May 16, 1986, in No. 85-1878, the petitioner joined with others in filing a petition for writ of certiorari seeking a dissolution of stays entered in the case in chief by the Eleventh Circuit and a ruling by this Court on whether the appeal from the District Court to the Court of Appeals was premature. While the petition was pending, petitioner also participated in filing an Application, No. A-239, with Justice Powell, to dissolve the stay orders issued by the Court of Appeals. On September 30, 1986, Justice Powell denied the Application, and on October 6, the Court denied the petition for writ of certiorari.

Though the Court of Appeals held in the State Board of Education appeal from the District Court's granting of a preliminary injunction that petitioner had no standing, it nevertheless affirmed the District Court's action in granting the injunction, based on the standing of other parties (the Knight Intervenors) to the proceeding. See *United States v. Alabama*, 791 F.2d 1450 (11th Cir. 1986). Thus, petitioner has suffered absolutely no injury from the ruling sought to be reviewed, and at least for the time being the issue is moot.

The question of the effect of the holding that petitioner lacks standing is currently pending before the Eleventh Circuit Court of Appeals in the case in chief. There, this respondent has contended that this petitioner and a similarly situated university were improperly realigned as plaintiffs. *See* Appellant The Board of Trustees of The University of Alabama's Opening Brief at

69-72 in *United States v. Alabama*, No. 86-7090 (*pending in* 11th Cir.).

The record of the case in chief pending in the Eleventh Circuit Court of Appeals consists of 180 volumes and 33 boxes of exhibits. It contains concrete facts necessary for the Court of Appeals to determine the impact of its prior holding that petitioner has no standing in this action. The respondents expect oral argument to be scheduled in this case in February or March, 1987.

REASONS FOR DENYING THE WRIT

The writ of certiorari should be denied because the issue of standing is not ripe for decision. If the writ were granted and the issue decided at this stage it would result essentially in an advisory opinion without benefit of concrete facts necessary for the Court to understand the full import of its decision. Further, the holding of the Court of Appeals is correct and does not conflict with applicable decisions of this Court, but is consistent with them, and can be distinguished from the holdings of other lower courts which the petitioner claims are contrary.

I. The Petition for Writ of Certiorari Is Premature.

This Court has long held that under the "case" and "controversy" limitation of Article III of the United States Constitution, it should not decide issues that are not ripe for decision. *See United Public Workers v. Mitchell*, 330 U.S. 75 (1947); *International Longshoremen's and Warehousemen's Union v. Boyd*, 347 U.S. 222 (1954); Floyd, *The Justiciability Decisions of the Burger Court*, 60 Notre Dame L. Rev. 862, 922-936 (1985). This Court as a rule does not decide a question "in advance of the necessity of deciding it." *United States v. Raines*, 362 U.S. 17, 21 (1960).

The petitioner takes issue with a decision of the Court of Appeals which affirmed the preliminary injunction

sought successfully by the petitioner and others in the District Court. The Eleventh Circuit held that although the petitioner lacked the capacity to secure the injunction under either 42 U.S.C. 1983 or 42 U.S.C. 2000d (Title VI of the Civil Rights Act of 1964), the Knight Intervenors, a class of individuals aligned with the petitioner, did have standing. Granting this petition and the relief it seeks would have no immediate effect on the relief sought by the petitioner, the conduct of the parties, the rights of petitioner's students, or the duties of the respondent State Board of Education. The preliminary injunction issued by the District Court remains fully in force. As indicated above and in the petition, the decision to which the petition is directed represents only a small part of a larger case involving the rights and obligations of the State of Alabama and all of its senior-level public institutions of higher education under the Fourteenth Amendment and Title VI. The case in chief is presently on appeal to the Eleventh Circuit Court of Appeals. Briefing has been completed and the parties are awaiting oral argument. The issues raised by this petition are raised in the appeal presently before the Eleventh Circuit. To the extent that petitioner relies upon characterizations of its role in the larger litigation—such as whether it asserted the interests of its students and faculty rather than institutional interests—those arguments are more properly directed to the Eleventh Circuit which will have the benefit of the record to test their accuracy and relevance.

The petitioner quite properly is anxious about the results of that appeal. However it is not accurate to assert that the decision below will "cripple [its] . . . ability . . . to represent the interests of its present and prospective students and faculty in the continuing case in chief or any other litigation . . ." (Petition, page 1).[1]

[1] The only remaining duty of petitioner in the case in chief is to present oral argument. This respondent is not aware of any "other litigation" underway or anticipated by petitioner.

The time to seek the review in this Court of the Eleventh Circuit's decision on the case in chief is after such a decision has been rendered.

II. This Court Should Not Give the Petitioner an "Advisory Opinion" On Standing Where No Concrete Factual Record On the Issue Is Before It.

Since President Washington asked the Justices of this Court a number of abstract questions regarding United States neutrality in a war between France and England, this Court has refused to issue advisory opinions. *See* D. Currie, *Federal Jurisdiction* 9 (1981). Although advisory opinions are traditionally requested by the legislative or executive branches of government, here the petitioner, by admitting that the injunctive relief it requested remains in effect in the Court below, is asking this Court for an advisory ruling. The request should be denied for all of the policy reasons supporting the rule against advisory opinions. As Justice Reed said many years ago, "the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite." *United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947).

III. The Petition Mischaracterizes the Decision of the Court of Appeals and Misstates the Nature of the Petitioner's Role in the Proceedings Below.

The petitioner is perhaps too distraught at the implications of the decision of the Court of Appeals. Although that court found that petitioner lacked the capacity to assert a claim under either 42 U.S.C. 1983, Title VI, or the Fourteenth Amendment, the decision below did nothing to diminish the protections that these provisions extend to petitioner's students and faculty. Despite respondents' arguments to the contrary, the Court of Appeals did not hold that petitioner was completely without the protection

of the law, or that under different factual circumstances and under different legal theories the petitioner as an institution might avail itself of some form of judicial protection:

> We agree with appellant that ASU has no standing to sue under either Section 1983 or Title VI. In so doing, however, we cannot accept appellant's broad contention that ASU, as a creature of state government, has no federally protected rights whatsoever under the Constitution or laws of the United States.

United States v. Alabama, 791 F.2d 1450, 1454 (11th Cir., 1986).

The petition also asserts that the decision of the Court of Appeals did not "address the argument that [the Board of ASU] could raise claims either as a representative of its students and faculty or in pursuance of the Board members' obligation to carry out their own oaths of office to obey the Constitution as the Supreme Law of the Land." (Petition, page 5.) As is abundantly clear in the record of the case in chief, the petitioner's interest in this litigation is in its own status as an institution. It pursued its own institutional objectives of increased funding, additional programs, facilities enhancement, and the acquisition of neighboring campuses (specifically, petitioner seeks merger of and control over Auburn University in Montgomery and Troy State University in Montgomery). It did not serve as a representative vehicle to assert the individual rights of its students and faculty. That this was clear not only to the Court of Appeals, but also to the District Court is evident by its certification of the class of Knight Intervenors. The record simply does not permit petitioner to disguise its attempt at institutional hegemony with the camouflage of being nothing more than a surrogate for the individual rights of its students.

Nor can petitioner's plea that Judge Johnson's opinion in the Court of Appeals will make it impossible

for its Board members to be true to their oaths and to the Constitution be taken as anything other than disingenuous. There are two principal obstacles to this argument. First, petitioner must show that it not only has the ability to sue under 42 U.S.C. 1983 and Title VI but also that it is somehow legally obligated to do so. The necessary premise of this argument is that by failing to bring suit against the State and the other public institutions, it would somehow incur liability under these same statutes. Unless it intends to admit to participation in an illegal conspiracy with the State there is nothing in either 42 U.S.C. 1983 or Title VI which would create liability on the part of petitioner for the conduct of another party.

The second difficulty with petitioner's argument is found in the pages of its own history. The Court of Appeals is not the source of petitioner's difficulty in complying with the Constitution. Petitioner remains the only public institution of higher education in Alabama which has been found guilty of class-wide race discrimination against its faculty. In *Craig v. Alabama State University*, 451 F. Supp. 1207 (M.D. Ala. 1978), *aff'd* 614 F.2d 1295 (5th Cir. 1980), petitioner was found liable for deliberate and systemic race discrimination against white faculty. Recently the Eleventh Circuit determined that the petitioner continues to suffer the effects of its own discriminatory practices:

> Judge Johnson's earlier decision in *Craig* establishes that ASU engaged in purposeful discrimination in all phases of employment practices resulting in an overwhelming imbalance in the racial composition of its workforce, *see* 451 F. Supp. at 1208, that persists virtually unchanged.

Craig v. Alabama State University, —— F.2d ——, slip op. at 491 (11th Cir. Nov. 18, 1986). With such a history (and a present) petitioner can hardly lay at the doorstep of the Court of Appeals any blame for its in-

ability to comply with the most basic requirements of the civil rights laws. The denial to petitioner of the right to bring suit against other state agencies has absolutely no effect on its ability to begin to recognize its obligations not to discriminate against its own faculty.

There is a further implication that needs to be addressed in petitioner's assertion of the factual bases for its petition. The petitioner presumes that its institutional identity is inseparable from the identity (and hence the civil rights) of black students in Alabama. This Court should be aware that the campuses of The University of Alabama System [2] enroll more black students than any other institution in the state, including petitioner and Alabama A&M, and that there are significantly more black students collectively attending universities operated by respondents in the State of Alabama than collectively attended the two predominantly black universities. *See* Alabama A&M Exhibits 203-234 (in case in chief) summarized on table *reprinted at* Appendix 1a. Moreover, "as a corporation" the petitioner "has no racial identity and cannot be the direct target" of "alleged discrimination." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263 (1977).

IV. The Decision of the Court of Appeals Finding That Petitioner Has No Standing under Title VI, the Fourteenth Amendment and Section 1983 Is Correct.

More than a century ago in the case of *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), Chief Justice Marshall stated that "the framers

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[2] The University of Alabama System, which is operated by this respondent, is composed of three campuses, The University of Alabama, located in Tuscaloosa, Alabama, frequently referred to as UA; the University of Alabama at Birmingham, frequently called UAB; and the University of Alabama in Huntsville, also known as UAH.

of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government . . ." 17 U.S. at 629. And from that date to this, it has been clear that "[p]ublic entities which are political subdivisions of states do not possess constitutional rights . . . in the same sense as private corporations or individuals. Such entities are creatures of the state, and possess no rights, privileges or immunities independent of those expressly conferred upon them by the state." *Randolph County v. Alabama Power Company*, 784 F.2d 1067, 1072 (11th Cir. 1986), *quoting from City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 154-55 (5th Cir. 1976). *See also, City of Trenton v. New Jersey*, 262 U.S. 182 (1923) and *Appling County v. Municipal Electric Authority*, 621 F.2d 1301 (5th Cir.), *cert. denied*, 449 U.S. 1015 (1980). This reasoning is buttressed by this Court's recent statements that a corporation "has no racial identity," and thus cannot be a legal target of discrimination, and in the ordinary case, has no standing to assert the rights of third persons. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263 (1977); *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

It also follows that state entities such as petitioner have no cognizable rights under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, since Title VI proscribes "only those racial classifications that would violate the Equal Protection Clause of the Fifth Amendment" of the United States Constitution. *Regents of the University of California v. Bakke*, 438 U.S. 265, 287 (1978).

This fundamental precept of constitutional law is based on sound principles of public policy and federalism. Untold confusion and expense to state citizens would result if the multitude of public institutions and agencies created by the states were allowed indiscriminantly to sue the state or other state agencies in federal court for

alleged constitutional or statutory violations of one kind or another or merely to obtain financial leverage over the state or their sister institutions. This case is a good example. It has caused a near gridlock in higher education in Alabama, resulting in large part from the allowance of two state institutions to realign themselves as plaintiffs and to sue the state and the remaining public institutions of higher education in Alabama.

The cases cited by the petitioner do not support its position in this case. In those cases where local school districts have been permitted to sue the state or state agencies, there are clear distinctions in the facts that make those holdings inapplicable here. There is a group of cases in which a state statute or current state action required a school board to take an action that conflicted with its constitutional or statutory duty or duty of its individual members.[3] In another line of cases, the local school board was asserting the constitutional rights of its students under circumstances deemed to satisfy the prudential "standing" requirements.[4]

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[3] For example, in *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982) the state of Washington had adopted a statute which prohibited school boards from assigning pupils to schools except those closest to their homes. This state action, if allowed, would have prevented the school board from fulfilling its constitutional duty to desegregate Washington schools. Similarly, in *Board of Education v. Allen*, 392 U.S. 236 (1968), a state law which required school boards to loan textbooks to private schools placed the school board members in the dilemma of breaking the state law or complying with a law they felt was unconstitutional. A similar case was *Evans v. Buchanan*, 379 F.Supp. 1218 (D. Del. 1974) where a Delaware law attempted to limit school attendance to city limits.

[4] In *Akron Board of Education v. State Board of Education*, 490 F.2d 1285 (6th Cir. 1974), *cert. denied*, 417 U.S. 932 (1974), a local board of education was held to have standing to sue the state board of education on behalf of its students to prevent transfer of a small area in its district to another district. Similar cases are *Bradley v. School Board*, 338 F. Supp. 67, 230 (E.D. Va. 1972), *rev'd on*

Here, there is no state statute or action which has required petitioner to take any unconstitutional or illegal action.

Further, the record in the case in chief pending below demonstrates that petitioner is litigating this case on behalf of its own institutional interests and not on behalf of others. Assuming, however, it does attempt to assert the rights of its students or faculty in this action, it is clear that it does not have standing to do so under traditional standing analysis. *See Singleton v. Wulff*, 428 U.S. 106 (1976) *and School District v. Missouri*, 460 F. Supp. 421 (W.D. Mo. 1978).[5] In the latter case, the

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other grounds, 462 F.2d 1058 (4th Cir. 1972) *aff'd by equally divided court, sub nom. School Board v. State Board of Education*, 412 U.S. 92 (1973) and *Little Rock School District v. Pulaski Co. Special School District No. 1*, 584 F. Supp. 328, 352 (E.D. Ark. 1984). The case of *Brewer v. Hoxie*, 238 F.2d 91 (8th Cir. 1956) relied on by petitioner in its brief, was a suit by a school district not against a state or governmental entity, but against private organizations such as the White Citizens Council of Arkansas, to prevent them from interfering with the school district's desegregation of schools in the district. Likewise, petitioner's reliance on *Papasan v. Allain*, 106 S. Ct. 2932 (1986) is misplaced, since no school district was a plaintiff in that case, only "local school officials and school children" who were impacted by an alleged school funding disparity. 106 S. Ct. at 2939. Here, the petitioner is a public corporate state entity. *See* Ala. Code § 16-50-21 (1975).

[5] This respondent has elected not to engage in extended briefing of the standing issue herein, in an effort to keep this brief in opposition to a reasonable length, and because it presumably would be given the opportunity to brief this issue at length, if the petition were granted. Suffice it to say that the important policy considerations which underlie the standing doctrine, are applicable here to support the denial of standing to petitioner. *See* Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881 (1983). Leading cases of this Court on this issue, such as *Allen v. Wright*, 468 U.S. 737 (1984) and *Warth v. Seldin*, 422 U.S. 490 (1974) are fully analyzed in Floyd, *The Justiciability Decisions of the Burger Court*, 60 Notre Dame L. Rev. 862 (1985).

court held a school district did not have standing to assert the rights of its students in a desegreagtion case because of the potential for a conflict of interest between the respective positions of the school district and its students. It was noted that the inquiry about discrimination necessarily began with the students' own district. 460 F. Supp. at 442. The same is true in the instant case. *See Craig v. Alabama State University*, 451 F. Supp. 1207 (M.D. Ala. 1978), *aff'd*, 614 F.2d 1295 (11th Cir. 1980). *See also Bender v. Williamsport Area School District*, 106 S.Ct. 1326 (1986).

As a creature of the State, under the decisions of this Court, petitioner has only such rights as the State confers upon it. Apart from the State, it has no independent right to existence or standing in federal courts to sue the State and, in its wisdom, the State may close it or merge it into other institutions. This Court, in its recent decisions involving higher education, has shown increasing reluctance to allow federal courts "to trench on the prerogatives of state and local educational institutions. . . ." *Regents of the University of Michigan v. Ewing*, 106 S. Ct. 507, 514 (1985). Indeed, the structure of higher education in a state, including the role, scope, and creation or abolition of individual institutions, is particularly a state function, often delegated to state educational officials. As long as individual student, faculty, and staff constitutional and federal statutory rights are not infringed, this Court has indicated that federal courts should not involve themselves in state educational affairs—decisions that require "an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 90 (1978). This principle is a recognition of the fact that "[b]y and large, public education in our Nation is committed to the control of state and local authorities." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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January 1987

APPENDIX

HEGIS 1984 FALL ENROLLMENT

Trial Ex. No.	School	Black	White	Total
A&M 205	A&M	3,089	249	4,109
A&M 208	AU	586	17,310	18,888
A&M 209	AUM	827	4,195	5,084
A&M 206	ASU	3,694	17	3,786
A&M 210	JSU	1,070	5,231	6,564
A&M 211	LU	523	968	1,500
A&M 213	TSU	868	3,392	4,344
A&M 216	TSUM	502	1,516	2,096
A&M 218	UA	1,392	13,642	15,626
A&M 219	UAB	2,417	10,757	13,517
A&M 234	UAH	319	5,264	5,863
A&M 212	UM	257	2,446	2,782
A&M 220	UNA	433	4,714	5,197
A&M 203	U of SA	977	7,731	9,342
A&M 207	ASC	82	1,122	1,220
	Blacks at PBI's	6,783	39.82%	
	Blacks at PWI's	10,253	60.18%	
	Total Blacks	17,036		